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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE MIGUEL WASHINGTON,

Defendant and Appellant.

D047417

(Super. Ct. No. SCD191187)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed in part, reversed in part and remanded with directions.

Andre Miguel Washington appeals a judgment arising out of his conviction of two counts of battery on a peace officer by gassing. He contends that (1) the court violated his constitutional rights by requiring him to wear a stun belt during trial; (2) the prosecutor's evidence submitted at the bifurcated trial on the prior conviction enhancements was incompetent under Evidence Code section 1280, subdivision (c); and (3) the abstract of judgment must be amended to reflect the actual custody credits ordered by the trial court at

the sentencing hearing. We find Washington's first two arguments unavailing, although as conceded by the Attorney General, his third contention is well-taken. Accordingly, we reverse the judgment insofar as it sets forth Washington's custody credits and remand the matter for correction of the abstract of judgment, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2005, Washington was charged with three counts of battery on a peace officer by gassing. (Gassing generally involves the intentional placing or throwing of human excrement or other bodily fluids, or any mixture containing such materials, on another person. See Pen. Code, § 243.9, subd. (b); *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 507.) At trial, the prosecution proceeded on two of the three counts. Washington testified, admitting that in the first incident, he squirted a mixture of fecal matter and urine at a deputy sheriff who was trying to serve him with a notice of a rule violation; he also admitted that, in the second incident, he spit at, and hit, another deputy as he was being returned to his cell from a court appearance. The theory of the defense was one of necessity, based on the argument that after Washington was gassed by another inmate, the deputies refused to provide him with cleaning supplies for two days, thus creating an unhealthy condition in his cell, and that he was forced to try to get their attention to improve his situation.

A jury convicted Washington of both counts and, in a bifurcated trial, the court found the enhancement allegations true. The court thereafter sentenced Washington to 10 years in prison. Washington appeals.

DISCUSSION

1. *Use of a Stun Belt at Trial*

A. The Facts

Prior to trial, Washington objected to the use of a stun belt during trial, contending that the belt was unnecessary, caused him pain relating to an existing back injury and made him feel so uncomfortable that it might be difficult for him to assist in his defense. Upon inquiry by the court, defense counsel admitted that Washington had been disruptive during a prior criminal trial (which occurred in July 2004) and had to be excluded from the courtroom on that basis.

The court then asked the courtroom bailiff to give "a brief statement as to what caused the decision to put on the belt" for the record and the bailiff responded that the decision was based on Washington's past assaultive conduct, his history of rule violations while in jail, the nature of the current charges against him and the fact that the stun belt was the safest and easiest way to secure him if he "dressed out" (i.e., dressed in civilian clothing rather than his jail attire). After confirming that Washington preferred to dress out, the court indicated that it was going to exercise its discretion to allow the deputies to leave the stun belt on him, but that it would reconsider the issue "on a daily basis."

When Washington appeared for trial, he was wearing his jail clothes, having refused to wear any of the three sets of civilian clothes offered to him. At that time, he was wearing the stun belt, as well as shackles and chains. The court instructed the bailiff to remove the shackles and chains before the jury came into the courtroom, but later released that instruction after Washington indicated that he wished to keep those

restraints on. The next day, Washington wore civilian clothes and the stun belt, although the record does not show whether he continued to wear the shackles and chains.

B. The Law

A criminal defendant cannot be subjected to physical restraints, including a stun belt, in the presence of the jury absent a showing of a "manifest need." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) The purpose of the rule is to avoid possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system or a prejudicial effect on a defendant's decision whether to testify. (*Id.* at p. 290.)

"Manifest need" is generally only established where, as a matter of record, the defendant has engaged in unruly behavior, has announced an intention to escape or has engaged in "nonconforming conduct or planned nonconforming conduct" that either has disrupted or would disrupt the judicial process if unrestrained. (*People v. Seaton* (2001) 26 Cal.4th 598, 651; *People v. Valenzuela* (1984) 151 Cal.App.3d 180, 192-193, & cases cited therein.) The trial court may not delegate to security or law enforcement personnel the decision as to whether the defendant should be restrained and it abuses its discretion if it abdicates that decision-making authority in that manner. (*People v. Mar* (2002) 28 Cal.4th 1201, 1218.) However, a requirement that the defendant wear restraints during courtroom proceedings, even if error, is harmless if there is no evidence that the jury saw the restraints or that the restraints impaired or prejudiced the defendant's right to testify or participate in his defense. (*People v. Anderson* (2001) 25 Cal.4th 543, 596.)

C. Analysis

Here, although a reading of the record suggests that the trial court may have deferred to the bailiff's decision to use a stun belt rather than exercising its independent judgment on the issue, we need not reach the issue of whether the court erred because in any event there is no indication that Washington was prejudiced thereby. Although Washington testified at trial, there is no evidence that the stun belt, which is designed to be worn underneath clothing, was visible to the jury. The absence of any prejudice to the jury is further established by the fact that, at least at the outset of trial, Washington continued to wear shackles and chains in front of the jury, at his own request.

Further, there is no indication in the record that Washington's demeanor or attention while testifying was adversely affected by the presence of the stun belt. Washington was able to follow the questioning and his answers were direct and undistracted. He unabashedly admitted that he gassed the deputies as charged, with the only issue being whether his conduct was justified by necessity. Although there was conflicting evidence as to the facts and circumstances underlying the necessity defense, this was not a case where resolution of the matter "turned completely" on witness credibility and demeanor. (Compare *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [held that compelling the defendant to wear a stun belt while testifying was prejudicial where the evidence was close and the demeanor of the witnesses, including the defendant, was crucial].) In addition, the record reflects that Washington was smirking and taking amusement from much of his testimony, belying the notion that he was nervous or distracted by the presence of the belt, while testifying or otherwise. Similarly,

Washington never made a subsequent request to have the belt removed despite the court's invitation to revisit the issue on a daily basis.

Under these circumstances, and in the absence of any indication in the record that Washington was actually hampered in his ability to assist counsel with his defense as a result of wearing the belt, we conclude that any error on the part of the trial court in requiring him to wear a stun belt at trial does not require a reversal of his convictions.

2. *Sufficiency of the Evidence of the Prior Convictions*

During the nonjury trial on the allegations regarding Washington's prior convictions, the prosecution offered a report by the prosecutor's fingerprint expert that attached copies of three fingerprint cards for "Andre Miguel Washington" arising out of a 1993 conviction of attempted robbery, a 1996 conviction of unlawful possession of a firearm and a 2003 conviction of resisting an executive officer and a mugshot card with pictures of Washington and his physical description taken by the sheriff's department in 2003. Washington objected to the admission of this exhibit on the ground that the expert lacked personal knowledge, and thus could not opine, that the fingerprints were made by him, leaving the exhibit without adequate foundation. Noting that the fingerprint cards referred to photographs that were "clearly" of Washington and that the cards included his social security number, the court found that there was adequate foundation for the admission of the exhibit.

On appeal, Washington contends that the exhibit was hearsay evidence that lacked sufficient trustworthiness to be admissible under Evidence Code section 1280, subdivision (c) and that, without that exhibit, the prosecution's evidence was insufficient

to establish his prior convictions. Specifically, he argues that the expert was required to take a new set of his fingerprints at trial and compare them to the prior fingerprint cards before properly opining that those prior fingerprints were his. (Washington has not raised any argument relating to the expert's report (which was duplicative of his trial testimony in any event) or the mugshot card and thus we limit our consideration to the propriety of the sufficiency of the fingerprint cards as the basis for the expert's opinions.)

The Attorney General responds that Washington has waived the issue because he failed to raise a timely and specific objection to the admission of the exhibit on hearsay grounds. We agree. Although counsel raised a hearsay objection after the fingerprint expert testified that his knowledge of who the prints "belong[ed] to" came from the information in the exhibit, no objection to the admission of the exhibit was made based on the hearsay rule. Further, defense counsel made no reference to or argument based on Evidence Code section 1280 in the proceedings below. Having failed to raise the issue below, Washington has waived it on appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

Even if Washington had not waived the issue, we would reject his argument in any event. Under Evidence Code section 1280, a writing of a public employee

"made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered . . . to prove the act, condition, or event if all of the following applies:

"(a) The writing was made by and within the scope of duty of a public employee;

"(b) The writing was made at or near the time of the act, condition, or event.

"(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

A trial court has broad discretion in determining whether a party has established the foundational requirements of Evidence Code section 1280. (*People v. Martinez* (2000) 22 Cal.4th 106, 120 (*Martinez*).)

The fingerprint sets attached to the expert's report were properly admitted under the official records exception to the hearsay rule. (Evid. Code, § 1280; compare *People v. Martinez, supra*, 22 Cal.4th 106.) The fingerprint sets were created and compiled under a record-keeping duty imposed by statute (Pen. Code, §§ 13125, 13150) and it is presumed that an official duty was regularly performed (Evid. Code, § 664), including the duty to prepare arrest documents at or near the time of the events recorded. (Pen. Code, § 13151.) Further, the documents had sufficient indicia of trustworthiness based on their certification by the Department of Justice as official records. (See *Martinez, supra*, 22 Cal.4th at pp. 125-134.) Further, in light of the evidence showing that Washington's photographs were taken for the mugshot card in connection with the arrest to which the third set of fingerprints related, we conclude that the court did not abuse its discretion in concluding that an adequate foundation had been laid for admitting the exhibit. (*Id.* at p. 120.) Thus, the prosecution's evidence was sufficient to establish Washington's prior convictions.

3. *Custody Credits*

Washington contends, and the Attorney General agrees, that the clerk's minutes and the abstract of judgment do not accurately reflect the custody credits calculated by the trial court at the sentencing hearing relating to case number SCD170395.

Accordingly, the judgment is reversed insofar as it sets forth the custody credits to which Washington was entitled as to that case number.

DISPOSITION

The judgment is reversed insofar as it sets forth custody credits relating to case number SCD170395 and is otherwise affirmed. The matter is remanded with directions to the trial court to enter an amended abstract of judgment specifying that Washington is entitled to 1,351 days in sentencing credits as to case number SCD170395.

McINTYRE, J.

WE CONCUR:

McCONNELL, P.J.

BENKE, J.